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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 531

OCCIDENTAL LIFE INSURANCE
COMPANY OF CALIFORNIA,
Petitioner,

versus

BOB LEROY'S INCORPORATED,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1969

No.

OCCIDENTAL LIFE INSURANCE COMPANY OF CALIFORNIA,

Petitioner,

versus

BOB LEROY'S INCORPORATED,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner-Defendant, Occidental Life Insurance Company of California, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, said Court's opinion being dated June 23, 1969, and the petition for rehearing filed by Appellant having been denied by the said Court of Appeals on July 17, 1969.

OPINION BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at ____ F.2d ____ (not yet reported) and is copied in Appendix A, infra, pp. 17-24. The case was submitted, with oral argument, on October 13, 1966, and the opinion was handed down on June 23, 1969.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was made and entered on June 23, 1969, and Appellant's petition for rehearing was denied by said Court on July 17, 1969, (R. 363), and a copy of the judgment of said Court is appended to this Petition in Appendix B, infra, pp. 25-26, and the order denying said Petition for Rehearing is appended to this Petition in Appendix C, infra, p. 27. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1), and Rule 19, 1(b), Revised Rules of the Supreme Court of the United States.

QUESTIONS PRESENTED

This action was filed in the United States District Court, Western District of Texas, El Paso Division, jurisdiction being founded upon diversity of citizenship of the parties. The action is based upon a conditional receipt, attached to a written application for life insurance on the life of Robert H. LeRoy. The conditional receipt was subject to a condition reading:

"2. *If the Company at its Home Office is satisfied that at the time of completing both Part I and Part II of the application the Proposed Insured was insurable under the Company's rules for a policy on the plan,* in the amount, at the class of risk and otherwise exactly as applied for in Part I of the application with the same number of this receipt; *then, but only after such conditions are met, the insurance will be effective,* from the date of Part I, the date of Part II, or the date specifically requested in the application, whichever is the latest, regardless of death or change of insurability of the Proposed Insured occurring after completion of both parts of the application. . . ." (Emphasis added) Ex. P. 51.

Respondent-Plaintiff introduced evidence bearing on the question of the good health of Robert H. LeRoy at the time the application was made, but offered no evidence on the question whether LeRoy was insurable under the Company's rules for a policy on the plan, in the amount, at the class of risk and otherwise exactly as applied for in Part I of the application. Hospital records showed a history of heart trouble, said records containing, among other things, electrocardiagrams which showed certain abnormalities, showing particularly with respect to the SP waves and T waves, a non-specific change in pattern. Petitioner-Defendant's underwriter testified that under the Company's practice, it would not approve, as insurable, a person with such a history, putting special emphasis on the electrocardiagrams.

The Court submitted to the jury six questions for it to answer, No. 1 being whether Petitioner-Defendant acted in good faith in determining LeRoy was not insurable, and No. 1A being whether LeRoy was insurable under Petitioner-Defendant's rules, for the policy applied for, over Petitioner-Defendants objection that there was no evidence raising said issues or to support a finding favorable to Respondent-Plaintiff. No. 1 was answered in the negative, and 1A was answered in the affirmative, and judgment was entered for Respondent-Plaintiff, and against Petitioner-Defendant, for $50,000.00, with interest, from September 15, 1963, at 6% per annum.

The Questions Presented Are:

1. Whether in this diversity case the Federal Courts are bound to follow, and enter a judgment in conformity with the decision of the Supreme Court of Texas, being the highest Court in the State of Texas, the Supreme Court of Texas having passed on the very point at issue, adversely to Respondent-Plaintiff, in *National Life and Accident Insurance Company vs. Blagg*, 438 S.W.2d 905, opinion dated March 12, 1969. A copy is attached as Appendix D.

2. Or, conversely, whether the Federal Courts can render in this case a judgment contrary to the one entered by the Supreme Court of Texas in the *Blagg* case.

THE DECISIONS INVOLVED

Fundamental is *Erie vs. Tompkins*, 304 U.S. 64, 82 L.Ed. 1188, holding that in a case where the jurisdiction of the Federal Courts is based on diversity of citizenship, the Federal Courts must apply the State law as declared by the highest State Court.

The Supreme Court of Texas, which is the highest State Court in Texas, held, in *National Life and Accident Insurance Company vs. Blagg*, 438 S.W.2d 905, opinion dated March 12, 1969, that in an action on a conditional receipt, the beneficiary must obtain a finding that applicant, on the relevant date, was insurable and acceptable for insurance under the Company's rules and practices for the amount, premium, and rating class set in his application for insurance; that the burden is on the Plaintiff-beneficiary to establish that a reasonably prudent authorized officer of the insurance company, acting in good faith, would, on the evidence available, find that the applicant was insurable and acceptable on the day of the completion of his medical examination. It is further stated in said opinion:

> "There is no testimony in this record to the effect that a reasonably prudent underwriter, acting in good faith, would form the opinion that Blagg was insurable, and acceptable on the date of the completion of his medical examination. In fact, all of the testimony is to the contrary.
>
> "Mrs. Blagg contends that a reasonably pru-

dent and careful underwriter, in good faith, would have formed the opinion that Blagg was, under the circumstances, insurable. But this Court does not judicially know that. It is a matter for the introduction of competent testimony. No witness gave testimony to facts which would have supported such a conclusion."

STATEMENT

Respondent-Plaintiff's action is based upon a conditional receipt, attached to a written application for life insurance on the life of Robert H. LeRoy (Tr. 3). Part I of the application, which is dated July 3, 1963, contains the statement:

> "It is agreed that: (1) This application shall consist of Part I and Part II and shall be the basis for any policy issued on this application; (2) Any policy issued on this application shall not take effect unless and until the first full premium is paid and the policy is delivered to the owner during the lifetime and good health of the Proposed Insured, except as otherwise provided in the receipt with the same number as Part I of this application; . . ."

The conditional receipt recited that it was "SUBJECT TO THE CONDITIONS ON THE OTHER SIDE OF THIS RECEIPT," and the reverse side contained the following statement:

"THE PAYMENT ACKNOWLEDGED BY THIS RECEIPT IS MADE AND RECEIVED SUBJECT TO THE FOLLOWING CONDITIONS:

"(A) 1. If the medical examinations, if any, required by the company are completed; and

2. *If the Company at its Home Office is satisfied that at the time of completing both Part I and Part II of the application, the Proposed Insured was insurable under the Company's rules for a policy on the plan,* in the amount, at the class of risk and otherwise exactly as applied for in Part I of the application with the same number of this receipt; *then, but only after such conditions are met, the insurance will be effective,* from the date of Part I, the date of Part II, or the date specifically requested in the application, whichever is the latest, regardless of death or change of insurability of the Proposed Insured occurring after completion of both parts of the application.* * *" (Emphasis added) Ex. P. 51.

On July 22, 1963, Robert H. LeRoy was killed by an accidental gunshot wound (Tr. 208). The Occidental

Life Insurance Company had received at his Home Office the said application on July 9, 1963, (Tr. 266). It was an application on him as a standard risk (Tr. 265). The application went to the Underwriting Department (Tr. 265), which determines from the information on it, and the information which the company assembles, whether the policy applied for will be issued or not (Tr. 262, 263). The company assembles other information by writing to the doctors whose names are listed by the applicant; an investigation is made as to applicant's occupation, income, etc.; and there may be special tests, such as x-rays, electrocardiograms, blood tests, etc. (Tr. 263). The applicant had stated on the application that he had been to a Dr. Gladstone, in El Paso, Texas, and on July 12, 1963, the underwriter wrote to Dr. Gladstone for a statement (Tr. 267). No reply to this letter had been received by July 22, 1963, (Tr. 267). His reply was dated July 30, 1963, (D-1, Tr. 269, 270).

The company continued its investigation, and on August 9, 1963, determined that applicant as of July 3, 1963, was not insurable under the company's rules for a policy on the plan, in the amount, at the class of risk and otherwise exactly as applied for in Part I of the application (Tr. 267, 283, 284). The company's decision that he was not insurable on July 3, 1963, was based upon medical records in Providence Memorial Hospital and Southwestern General Hospital, El Paso, Texas (Tr. 270, 273). These records contained information that Mr. LeRoy had had, over a period of many years, heart trouble, said records including electrocardiograms with doctor's readings on them:

"Dx Suggestive of diffuse (Intero-Antero-Lateral) subendocardial injury"; "comparison of EKG of 8-21-58 shows elevated ST Segments in L, II, AUF, AVL, V2, V3, V4, V5, V6, C upright T waves. Dx Diffuse subendocardial injury." "Comparison of EKG of 5-22-58 shows slight accentuation of ST changes, with mild elevation now noted in III as well. Persistence of three changes without significant solution — is highly suggestive of pericarditis."

Mr. Logan, Associate Manager of Petitioner-Defendant's Underwriting Department, and who was the underwriter who passed on this application, testified: At the time he passed on this application he had before him information as to what was in the Providence Hospital records (Tr. 270); that the electrocardiograms were routinely sent to Petitioner - Defendant's Medical Department and the evaluation was then given to him (Tr. 266); that he had before him Dr. Logsdon's report, as shown on the hospital records (Tr. 271); that some of the EKGs were abnormal (Tr. 271); that he had the opinion of one of Appellant's doctors, which agreed with Dr. Logsdon's reports; that with respect to the SP waves and T waves, a non-specific change in pattern was noted (Tr. 271, 272). He also testified he had before him at that time the Southwestern Hospital records of 1959 relative to Mr. LeRoy (Tr. 273). He further testified with respect to the information from Providence Memorial Hospital (Tr. 261, 262, 265):

> "We never issue standard insurance to applicants showing those variations in the electrocardiogram." (Tr. 272)

He further testified, after stating he also had the information from Southwestern General Hospital:

> "Well, that information, in conjunction with the previous information, meant to me that the applicant wasn't going to qualify for any type insurance." (Tr. 273)

He further testified Petitioner-Defendant's policy or practice, with respect to applicant having the hospital record and history that Mr. LeRoy had on the records of Providence Memorial Hospital and Southwestern General Hospital, was:

> "We can't offer him coverage on any basis. He has to be declined." (Tr. 274)

He further testified he consulted with Dr. Travenick, then the Company's medical director (Tr. 265), who concurred in Mr. Logan's conclusion (Tr. 275).

Mr. Logan further testified that if the company has an applicant who has twice given to attending physicians a history of two separate heart attacks, who has a series of EKGs with abnormalities shown in them, who has readings on EKGs by doctors as to a mild coronary insufficiency, and subendocardial changes, and a possible diagnosis of pericarditis, that said history is far to serious to attempt to cover such an applicant with a rate (Tr. 280, 281). He said:

> "I don't think it would be good underwriting practice to offer sub-standard insurance. I would decline a case like that." (Tr. 281)

He further testified that he doesn't consider these items of health history separately, but he has to look at the whole picture (Tr. 281); and that he would give a considerable amount of weight to the applicant's own history, as given to attending physicians on prior admissions to hospitals, as compared with subsequent testimony by physicians, relatives and friends (Tr. 281, 282); that because of the applicant's history shown in the hospital records he was not classifiable as a standard risk (Tr. 283); and that the history with the EKG information influenced his decision to decline him even with a sub-standard rating (Tr. 283); that at the time he so acted, he was acting on behalf of the Occidental Life Insurance Company at its Home Office (Tr. 283); that when he made the determination on August 9, 1963, with respect to whether the company at its Home Office was satisfied at the time applicant completed Part I and Part II of the application he was not insurable under the company's rules for a policy on the plan, in the amount and at the class of risk that was applied for, "we determined he was not qualified to receive that policy" (Tr. 284). That if he had the same information before him on the date he testified, that he still would not be able to offer applicant standard insurance (Tr. 284). That the company's action on Mr. LeRoy's application was in line with standard underwriting practices (Tr. 284).

Mr. Logan further testified on cross-examination that the applicant had a history of chest discomfort as reported by him, and that he had abnormal EKGs, and that this was a deciding factor. That he looked at the whole picture, and that even if the examining doctor

found that he was in pretty good shape, his history and the EKGs put him in a different classification; and that people with inverted T-waves, with that type of electrocardiograms, are never classified as a standand risk (Tr. 294). That the company's determinations as to insurability are based on mortality experiences, that is, on experience in the life insurance industry; that they know if enough people show that abnormality, some of them are going to die before the normal expectancy; that they do not know which one, but they know some will (Tr. 296). That it is not a question of whether a man is in good health at the time of making the application, or having his medical examination, because he could be in splendid health and "we wouldn't give him a dime of insurance" (Tr. 302), but that it depends upon the history of his health (Tr. 302, 303).

In spite of the fact that the Pre-Trial Order stated one of the issues of fact to be "Was Robert H. LeRoy, in fact, insurable under the rules and regulations of the Defendant" (Tr. 16), and this was the second special issue (1-A) submitted by the Court to the jury (Tr. 339), the burden of proving which was on the Respondent-Plaintiff, *National Life and Accident Insurance Company vs. Blagg*, 438 S.W.2d 905, the testimony offered by Respondent-Plaintiff did not touch upon that question. There was no testimony offered either directly or indirectly to the effect that the Occidental Life Insurance Company was satisfied at its Home Office that applicant was to insurable. No testimony was offered by Respondent-Plaintiff as to what the requirements of Petitioner-Defendant are for an applicant to be approved as a standard risk, or whether

present good health is enough, or what part of the applicant's medical and health history plays in making this determination. Nor did Respondent-Plaintiff offer any testimony as to what a reasonably prudent underwriter would do under the circumstances here existing.

On the contrary, Respondent-Plaintiff apparently assumed it was sufficient to present evidence of good health on the date of the application, Mr. LeRoy's widow, whose name at the time of trial was Hazel Mae Abbott, testified, as did three of applicant's friends, Paul W. Wilson, William W. Haughton, and Walter Milner. Their testimony was all to the effect that Mr. LeRoy's health was good. There was also testimony given by Drs. John Searls, Charles Logsdon and Larry Gladstone. Their testimony was all along the line of whether Mr. LeRoy had a history of heart trouble, and whether his history of heart trouble, as shown by hospital records, including electrocardiagrams, was serious, or whether he was in reasonably good health. None of Respondent-Plaintiff's witnesses testified on the question of Defendant's rules or practice as to insurability, or as to what a reasonably prudent underwriter would require with respect to insurability. Thus, there was evidence as to Mr. LeRoy's health, but no evidence on the question of the rules and practice either of Petitioner-Defendant or of a reasonably prudent underwriter as to the insurability of a person with the history of heart trouble which Mr. LeRoy had. There was no evidence that Mr. LeRoy met Petitioner-Defendant's requirements for insurability, or that he met the requirements of a reasonably prudent underwriter in such a case.

REASONS FOR GRANTING THE WRIT

The reason for granting the Writ is quite simple. We operate under the Rule of *Erie vs. Tompkins,* and we have a recent decision from the Supreme Court of Texas which is directly in point, to-wit, *National Life and Accident Life Insurance Company vs. Blagg,* 438 S.W.2d 905. In the *Blagg* case, the Supreme Court of Texas held plaintiff needed a witness to testify that a reasonably prudent underwriter, acting in good faith, would have formed the opinion that Blagg, under the circumstances was insurable. It said this was a fact which the Court did not judicially know, and

> "It is a matter for competent testimony. No witness gave testimony to facts which would have supported such a conclusion."

The same thing is true here. Respondent offered no evidence on said issue. Its evidence was all directed toward proving the good health of the applicant at the time in question, but as said in *Kallman vs. Equitable Life Assurance Society,* 248 App. Div. 146, 148 (N.Y. 1936) aff'd. 272 N.Y. 648:

> "The distinction between 'good health' and 'insurability' might be illustrated in the case of a criminal condemned to death. On the eve of his execution he might be found to be in perfect physical condition but it could not be reasonably contended that his situation did not affect his insurability. There are numerous circumstances which affect insurability. In *Ginsberg v. Eastern Life Insurance Company* (118 N. J. Eq. 223; 178 Atlantic 378; aff'd, 120 N.J.

> Eq. 110; 184 Atlantic 348) the Court said that it is common knowledge that an insurance company will not reinstate a policy where it is known that the insured is financially insolvent and the circumstances show probability of suicide."

Testimony on "good health" does not show "insurability." Mr. Logan, Petitioner's underwriter, testified a great deal depends on the history, and that "a man could be in splendid health and we wouldn't give him a dime of insurance." This is because there is a great margin of play in the concept of good health, and a person apparently in good health, but with a history of heart trouble, or tuberculosis, or of a cancer that hopefully has been cured, may not be insurable simply because statistics, which govern the decisions of underwriters, show a larger percentage of people with such a history die sooner than does the average person without such a history.

This is why the Supreme Court of Texas held testimony is required, from which a finding can be made that a reasonably prudent underwriter, in good faith, would have found Applicant insurable. In the *Blagg* case, the Court said, "All the testimony is to the contrary." The same thing is true here.

The Court of Appeals' holding is contrary to the decision in the *Blagg* case, and the reason for granting the writ here sought is to follow *Erie vs. Tompkins* by applying and following *National Life Insurance Company vs. Blagg*, which the Court of Appeals did

not do. This will comply with the provision of Rule 19, 1(b), which provides the character of reasons which will be considered in granting a Writ, are "Where a Court of Appeals has decided an important State or territorial question in a way in conflict with applicable State or territorial law,..."

CONCLUSION

It is tremendously important that if we are to have the rule of Erie vs. Tompkins, the Courts go by it. Here we have, in the Blagg case, a recent decision from the highest State Court in Texas, which is directly in point, but the Court of Appeals, more than three months after the decision in the Blagg case, and of which it had been made aware, handed down an opinion to the contrary in this case. This situation can be rectified only by this Honorable Court, as in Rule 19, 1(b) provided, and Petitioner-Defendant therefore prays its Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX "A"

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 23124

OCCIDENTAL LIFE INSURANCE COMPANY OF CALIFORNIA,

Appellant,

versus

BOB LEROY'S INC.,

Appellee.

Appeal from the United States District Court for the Western District of Texas

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(June 23, 1969)

Before JONES and COLEMAN, Circuit Judges, and HEEBE, District Judge.

JONES, Circuit Judge: This case presents the issue of whether or not a beneficiary may, under the terms of the particular insurance contract involved here and the law of Texas, recover proceeds on the death of the insured. The district court rendered judgment, pursuant to a jury verdict in favor of the bene-

ficiary, for the face amount of the insurance coverage, in the sum of $50,000.

Appellant, the Occidental Life Insurance Company of California, solicited an application from Bob LeRoy's Inc., and Robert H. LeRoy, its president, for a policy of insurance on the life of LeRoy. The application was for a fifteen-year commercial term policy in the amount of $25,000, at standard rates, with an accidental indemnity rider for an additional $25,000. Prior to the submission of a written application, on July 3, 1963, LeRoy made himself available for a medical examination to a physician employed by Occidental, who rendered his report to the Company. The application itself was signed by LeRoy and submitted to Occidental on July 5, 1963. On the same day, LeRoy presented his company's check to the agent for Occidental, in payment of the first premium, and received from the agent a "Conditional Receipt." LeRoy died in an accident seventeen days later. No formal policy was issued by Occidental. The pertinent terms of the receipt were as follows:

> "If the Company at its Home Office is satisfied that at the time of completing both Part I and Part II of the application the Proposed Insured was insurable under the Company's rules for a policy on the plan, in the amount, at the class of risk and otherwise exactly as applied for in Part I of the application with the same number of this receipt; then, but only after such conditions are met, the insurance will be effective, from the date of Part I, the date of

> Part II, or the date specifically requested in the application, whichever is latest, regardless of death or change of insurability of the Proposed Insured occurring after completion of both parts of the application."

Occidental made the determination that LeRoy was not "insurable under the Company's rules" and declined to make payment. The insured, Bob LeRoy's Inc., brought suit to recover and the primary issue was whether Occidental had made a good faith determination of the uninsurability of LeRoy. At the conclusion of the trial the district court gave instructions as to the applicable law and submitted the case to the jury on special interrogatories. It is not contended that the governing principles of law as contained in the court's charge was erroneous.

Before the court was evidence that LeRoy had some time previously been treated for a heart condition and there was evidence that the condition was not regarded by him as serious and that there was a reasonable basis for his views with respect to his condition. Occidental undertook to show that its standards of insurability were not met by LeRoy and that it would not in view of his medical history have issued the policy on his life for which application had been made.

The jury found in its responses to the interrogatories that LeRoy had given false answers to the questions in his application with respect to his health and previous medical history and that such answers were material to the risk but that LeRoy did not know of the

falsity of the representations and that such answers were not falsely made with intent to deceive. The jury found that Occidental did not act in good faith and upon a reasonable basis in determining that LeRoy was an uninsurable risk for the insurance sought by the application.

The court entered its judgment for the insured, Bob LeRoy's Inc., from which Occidental has appealed. The only contention urged by Occidental on appeal is that the evidence required a judgment for it and did not permit a judgment for the appellee.

Federal jurisdiction is based upon diversity of citizenship. The contract is a Texas contract and the case was submitted to and decided by a Federal district court in Texas. It is to the Texas law that we look for a guide to decision.

By the quoted provisions of its conditional receipt, Occidential accepted the premium payment in return for insurance effective upon the issuance of the receipt. Occidental reserved the right to make such investigation it deemed proper into the applicant's past medical history and physical condition to the date of the application and the conditional binder was granted on the express condition that "the Company at its Home Office is satisfied that at the time [of the application] the Proposed Insured was insurable under the Company's rules for a policy . . . as applied for." All that Occidental agreed to waive was an investigation into the applicant's condition subsequent to the date of the binder agreement.

The binder provided for coverage only if Occidental was satisfied that the applicant was "insurable under the Company's rules." The agreement thus makes Occidental's satisfaction, not insurability per se, the condition of coverage. Obviously, a limitation must be imposed on such a condition if mutuality of obligation consistent with the intent of the parties is to be preserved. The determination cannot be an arbitrary one and must be made in good faith. See 1A Corbin on Contracts, Sec. 165, pp. 86-87. Such an interpretation has been imposed as a matter of law on binders of this type by the Texas Supreme Court. *United Founders Life Insurance Company v. Carey*, ____ Tex. ____, 363 S.W.2d 236. The district court in this case was bound by this rule of Texas law. *Erie R. Co. v. Tompkins*, 304 U.S. 64; 58 S.Ct. 817, 82 L.Ed. 1188.

The issue as to whether Occidental acted in bad faith in determining that LeRoy was uninsurable in accordance with its rules was properly submitted to the jury.

The issue as to whether an act was done in good faith or in bad faith is primarily a question of fact. It involves the question of intent and may require a determination of a state of mind. Motive may be highly important. Circumstantial, as well as direct, evidence is to be considered. Inferences may, of course, be drawn by the finder of factual issues and credibility questions may be of great importance. The judicial fact determination must, of course, find support in the record. In this case there is substantial evidence of insurability. Occidental's contrary finding was made

subsequent to the death of the applicant on the basis of an investigation shown to have been beyond the usual scope of the Company's practice. The jury had the opportunity to weigh the credibility of Occidental's officers and to consider the testimony as related to all the aspects of the case. The issue of good or bad faith was properly raised for the jury's consideration. To take the issue out of the jury's province in this case would be to make proof of bad faith in these situations a practical impossibility. Even if there were no positive direct evidence of bad faith, certain inferences from the totality of the evidence are possible. The jury is permitted, even if nothing else supports their conclusion, to make negative inferences from the testimony and attitude of defense witnesses. A jury has broad powers to draw inferences from evidence, even when it is undisputed. *Chicago, St. P., M. & O. Ry. Co. v. Washington,* 8th Cir. 1950, 179 F.2d 548; *Anchor Cas. Co. v. Bowers,* ____ Tex. ____, 393 S.W.2d 168. This is the more necessary where inferences of good or bad faith must be made, which often depend so little on direct evidence and so much on inferences drawn from circumstances.

Occidental urges that the district court committed error in submitting to the jury the question as to the insurability of LeRoy. If he was not in fact insurable, and Occidental had determined that he was not insurable, it would seem difficult to assume that a finding would be made or sustained that a determination of uninsurability had not been made in good faith. But if the applicant was not insurable under the rules of the Company and it had been so found by the Com-

pany, whether or not such finding be made in good faith, recovery upon the policy would not, it seems, be permitted under the Texas law. See *National Life and Accident Ins. Co. v. Blagg*, ____ Tex. ____, 438 S.W. 905; *United Founders Life Insurance Company v. Carey*, ____ Tex. ____, 363 S.W.2d 236.

Occidental contends that the appellee had, but failed to sustain, the burden of proof with respect to the rules and standards of Occidental as to insurability. The record discloses that the evidence relating to this phase of the case was fully developed and that the jury was properly and adequately instructed with respect thereto.

Finally, appellant contends that the evidence introduced at trial forces the conclusion that certain answers given by the deceased to Occidental's examining physician falsified his prior medical history, that such answers were misrepresentations material to the risk, and that they were known by LeRoy to be false and were made with the intent to deceive Occidental. Proof of all of these elements constitutes a valid defense to recovery of insurance proceeds under Texas law. *Clark v. National Life & Accident Ins. Co.*, 1947, 145 Tex. 575, 200 S.W.2d 820; *Manhattan Life Ins. Co. v. Harkrider*, Tex. Civ. App. 1965, 396 S.W.2d 207, Ref. n. r. e. 402 S.W.2d 511; *General American Life Ins. Co. v. Martinez*, Tex. Civ. App. 1941, 149 S.W.2d 637; 14 Vernon's Tex. Civ. Stat., Art. 21.16. This Court has previously so interpreted the law of Texas. *Roosth v. Lincoln Nat. Life Ins. Co.*, 5th Cir. 1959, 269 F.2d 171, 178, cert. den. 361 U.S. 917, 80 S.Ct. 262, 4 L.Ed.2d

186. See, generally, 32 Tex. Jur. 2d, Insurance Sec. 221, et seq. The trial court, properly we think, reserved these issues for the jury, and properly instructed the jury thereon.

The jury made findings adverse to Occidental's contentions which were properly included in the court's determination and judgment. The fact that the appellee's answers were false does not compel a finding that, at the time they were made, he knew of the falsity or made the answers with any intent to deceive the Company. Under Texas law, it is settled that for false statements to avoid an insurance policy they must have been made willingly and with an intent to deceive. *Great Southern Life Ins. Co. v. Doyle,* 136 Tex. 377, 151 S.W.2d 197; *Bankers Health and Life Ins. Co. v. Ryan,* Tex. Civ. App., 411 S.W.2d 373; *Manhattan Life Ins. Co. v. Harkrider,* supra.

Questions of fact were presented to the jury which it resolved in favor of the appellee. It does not appear that the findings were clearly erroneous.

The judgment of the district court is AFFIRMED.

APPENDIX "B"

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1966

No. 23124

D. C. Docket No. CA 2583

OCCIDENTAL LIFE INSURANCE COMPANY OF CALIFORNIA,

Appellant,

versus

BOB LEROY'S INC.,

Appellee.

Appeal from the United States District Court for the Western District of Texas

Before JONES and COLEMAN, Circuit Judges, and HEEBE, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court

for the Western District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

It is further ordered that appellant pay to appellee, the costs on appeal to be taxed by the Clerk of this Court.

June 23, 1969

Issued as Mandate:

APPENDIX "C"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 23124

OCCIDENTAL LIFE INSURANCE COMPANY OF CALIFORNIA,

Appellant,

versus

BOB LEROY'S INC.,

Appellee.

Appeal from the United States District Court for the Western District of Texas

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(July 17, 1969)

ON PETITION FOR REHEARING

Before JONES and COLEMAN, Circuit Judges, and HEEBE, District Judge.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED. The motion for oral argument is DENIED.

APPENDIX "D"

THE NATIONAL LIFE AND ACCIDENT INSURANCE COMPANY v. MRS. ALVIN BLAGG
No. B-1174

From Victoria County, Thirteenth District.

Writ of error granted November 20, 1969, (12 Tex. Sup. Ct. Jour. 120.) (Opinion of CCA, 431 S. W. 2d 396.)

Judgments of the Courts below are reversed and judgment rendered that plaintiff take nothing. (Opinion of the Court by Associate Justice Greenhill.)

For Petitioners: Guittard, Henderson, Jones and Lewis, O. F. Jones, III, Victoria, Texas.

For Respondent: Cullen, Mallette, Maddin, Edwards and Williams, Donald A. Edwards, Victoria, Texas.

This is a suit upon an alleged contract of life insurance. Alvin Lee Blagg applied to the National Life and Accident Insurance Company for a life insurance policy, and at the time of his application he was issued a "conditional receipt" for his deposit of the first premium of $8.50 on the proposed insurance. Blagg died before any insurance policy was issued. His widow brought this suit against the company to recover $10,000, the amount of the policy applied for, basing her

suit on the terms of the "conditional receipt" issued to Blagg. Trial was to a jury, and judgment was entered on the jury's verdict favorable to Mrs. Blagg. The Court of Civil Appeals reversed and remanded the cause for a new trial. 431 S. W. 2d 396. The insurance company is a petitioner here, and the only point before us concerns the Court of Civil Appeals' alleged error in remanding the cause for new trial rather than rendering judgment for the company.

Crucial to Mrs. Blagg's recovery was the question whether temporary life insurance was in effect at the time of her husband's death. The receipt involved contains the following provision:

". . . Said deposit is received by the Company subject to the following conditions: (1) . . . Insurance under terms of policy applied for shall take effect as of date of said deposit or date of medical examination (if required), whichever shall be the later, provided that on that date Proposed Insured, in the opinion of the Company's authorized officers in Nashville, Tennessee, was insurable and acceptable under the Company's rules and practices for the Amount, Premium and Rating Class applied for."

Blagg was required to take a medical examination. It was given by Dr. Don L Wendt in Victoria, Texas, on July 16, 1965. The doctor's report reflected that Blagg's blood pressure and other indications of health were normal. In response to a question on the printed "Medical Examiner's Report" supplied to Dr. Wendt by the company, Dr. Wendt rated Blagg as a first

class risk. It should be noted, however, that in filling out his written application form, Blagg stated that in 1962 he had been confined in a hospital for a general check-up as required by his employer, with "results slightly low blood pressure."

On July 19 the doctor's report and the application form were forwarded from the company's district office in Victoria, where Blagg lived, to the company's home office in Nashville, Tennessee, where on July 21 the records were first brought to the attention of Kenneth F. Haas, an underwriting manager for the company. Mr. Haas testified that Blagg's application form together with the company's own records, which were compiled independently of any information supplied by Blagg or Dr. Wendt, showed that for three consecutive years prior to his application for insurance, Blagg had been treated for a blood pressure abnormality. The evidence shows that normal blood pressure for a man Blagg's age and size would be 140 systolic over 90 Diastolic (140/90). According to the expert testimony in the record, any reading above that level would be abnormal. The company's records reflected that in May of 1960 Blagg's blood pressure readings on separate occasions had been 160/110, 152/100, and 132/90. In 1961 it was 160/100. And as noted above, Blagg's application form showed that in 1962, he had been confined in a hospital with "results slightly low blood pressure."

In addition, Blagg answered "no" to a question on the application form inquiring if he had ever had any ailment or disease of the heart. Mr. Haas testified,

in effect, that Blagg's negative response to the question, in conjunction with the company's own records and Blagg's admission that he had been confined in a hospital in 1962 with a blood pressure problem, raised a question in his mind concerning the reliability of Blagg's representation that he had never had an ailment or disease of the heart.

On the basis of the foregoing evidence, Haas testified that on July 21, the day Blagg's application and the company's records were first brought to his attention, he formed an opinion that Blagg was not insurable on the date of his medical examination, July 16, for the plan, classification, and rate applied for. For the purpose of determining whether Blagg would be insurable at a higher rate, Haas testified that on that same date, July 21, and again on August 6, the company's medical director in Nashville wrote a letter at Haas's direction to Dr. Wendt in Victoria, requesting him to re-examine Blagg with specific instructions to inquire for any history or symptoms of abnormal blood pressure, and to record his blood pressure again on two different days with Blagg in a sitting position. A urine specimen was also requested to be forwarded to the home office for a laboratory analysis. Dr. Wendt was also requested to ascertain whether Blagg had ever been treated for hypertension, and if so, for how long and what medication or treatment he had received.

The July 21 letter to Dr. Wendt also contained the notation, "Applicant has history of high blood pressure, 160/110, and treatment." This circumstance corrobo-

rates the testimony of Haas to the effect that the company was aware before Blagg's death that he had a history of high blood pressure, and had determined him to be uninsurable at the standard rate for that reason. Dr. Wendt acknowledged having received the two letters requesting additional information, but due to a misunderstanding between Dr. Wendt and the Victoria office as to the procedure to be followed, Blagg was never re-examined by Dr. Wendt: and, as a consequence, neither the Nashville office nor Haas ever received the additional information requested. Blagg died suddenly of a heart attack on August 14, 1965. The company's home office was first notified of Blagg's death by a letter dated August 18, 1965, and his application for insurance was declined shortly thereafter. The company denied liability under the conditional receipt to Mrs. Blagg, the beneficiary, and this suit resulted.

As expressed by this Court in United Founders Life Ins. Co. v. Carey, 363 S. W. 2d 236 (1962), conditional receipts such as the one presently before us provide for temporary life insurance; and the insurance is to be effective on the date of completion of the applicant's medical examination if in the opinion of the company's authorized officers he was on that date insurable and acceptable according to the terms of the receipt.

Thus, a beneficiary can prove that the temporary insurance provided by the receipt was in force when the applicant died by obtaining a fact finding that in the opinion of the officers of the insurance company the applicant was insurable and acceptable on the date

of the completion of his medical examination. Even if the opposite finding is made by the jury, i.e., the opinion was formed that the applicant was not insurable and acceptable on the date of the completion of his medical examination, the beneficiary can still prevail by obtaining a fact finding that the determination of uninsurability was not made in good faith. As a part of this second basis of recovery, it would also be necessary to obtain a finding that a reasonably prudent authorized officer of the insurance company, acting in good faith, would, on the evidence available, find that the applicant was on the date of the completion of his medical examination insurable and acceptable for insurance under the company's rules and practices for the amount, premium, and rating class set in his application for insurance.

A third basis of recovery would be afforded under the Carey case if the insurance company arbitrarily refused to proceed to the formation of an opinion after the applicant's death, and a reasonably prudent underwriter confronted with the same circumstances would have formed the opinion that he was insurable.

In the trial of the instant case, all three theories were submitted to the jury in a total of five special issues. Special Issue No. 1 inquired whether the company's authorized officers ever formed an opinion regarding Blagg's insurability on the date of his medical examination. The jury answered: "They did form an opinion." Special Issue No. 3, which inquired what opinion had been formed, was answered: "The opinion was that he was insurable and acceptable." These were

the only two issues answered by the jury, and they formed the basis of the court's judgment in favor of Mrs. Blagg, the beneficiary. The other three special issues (Nos. 2, 4 and 5) were in a form sufficient to support a judgment under the second and third grounds of recovery outlined in the Carey case, but they were not answered because they were conditionally submitted upon the giving of opposite answers by the jury to Special Issues Nos. 1 and 3.

The Court of Civil Appeals held that there was no evidence in the record to support the jury's answer to Special Issue No. 3 that the insurer had formed the opinion that Blagg was insurable and acceptable. Since this holding was not assigned as error in a motion for rehearing before the Court of Civil Appeals or in an application for writ of error before this Court, it is final in the Court of Civil Appeals, and we have no jurisdiction to review it.

Under Rule 434, when a Court of Civil Appeals sustains a "no evidence" point, it is generally the court's duty to render judgment for the appellant because that is the judgment the trial court should have rendered. See Calvert, "No Evidence" and "Insufficient Evidence" Points of Error, 38 Texas Law Review 359, 368-69 (1960). Rule 434 also provides, however, that the cause shall be remanded for a new trial "when it is necessary that some matter of fact be ascertained or the damage to be assessed or the matter to be decreed is uncertain. . . ." This phrase has been interpreted to grant to the Courts of Civil Appeals the same discretion this Court has under Rule 505 to re-

mand "if the justice of the case demands another trial. . . ." Rule 505; London Terrace, Inc. v. McAlister, 142 Tex. 608, 180 S. W. 2d 619 (1944); Williams v. Safety Cas. Co., 129 Tex. 184, 102 S. W. 2d 178 (1937).

In this case, the Court of Civil Appeals did not render the judgment the trial court should have rendered. Instead, it remanded the cause to the district court for a new trial. Since the court had no authority to remand except in the interest of justice, its judgment would not be correct unless it remanded for that reason. But the Court of Civil Appeals in this case did not remand in the interest of justice; it assigned no reason at all for remanding the cause for another trial. It is possible that the subjective intention of the court was to remand in the interest of justice, but we have no way of determining if that is so. Neither the court's opinion nor its judgment reflect the basis of the court's action. We do not have before us the question whether the court abused its discretion in remanding in the interest of justice because the court did not exercise its discretion to remand in the interest of justice. The judgment of the court remanding for retrial is not in keeping with the rule of decision prescribed in Rule 434, and it cannot be permitted to stand.

We turn now to the question as to whether we should remand the cause in the interest of justice. As stated, the trial court rendered judgment for Mrs. Blagg on the jury's verdict. The Court of Civil Appeals sustained the company's point that there is "no evidence" to support the jury's verdict, reversed the trial court's judgment based on that verdict, and remanded the

cause for a new trial. Having determined that there is error in the Court of Civil Appeals' judgment remanding the cause as it did, Rule 505 would normally require this Court to reverse the judgments of the courts below and render judgment that plaintiff take nothing. As noted above, however, Rule 505 also authorizes this Court to remand the cause for a new trial if the justice of the case so demands. C & R Transport, Inc. v. Campbell, 406 S. W. 2d 191 (Tex. Sup. 1966); Scott v. Liebman, 404 S. W. 2d 288 (Tex. Sup. 1966); Hicks v. Matthews, 266 S. W. 2d 846 (Tex. Sup. 1954). Counsel for Mrs. Blagg concedes the finality of the Court of Civil Appeals' holding that there is no evidence to support the jury's finding to issue number 3 that an opinion of insurability was formed. Counsel argues, however, that evidence was produced at the trial which would have supported jury findings in favor of Mrs. Blagg on one of the alternative theories of recovery which were submitted to the jury by Special Issues Nos. 2, 4 and 5 and left unanswered because of the conditional submissions. We are requested in the interest of justice to permit a retrial of the case in order to give another jury the opportunity to make findings in Mrs. Blagg's favor on one of these alternative theories.

Our own review of the record convinces us, however, that a retrial of this cause would not subserve the interests of justice. More specifically, we cannot agree with the contention that "some evidence" was produced at the trial which would have supported jury findings on one of the alternative theories of recovery. As stated, a beneficiary can prevail in a suit upon

a conditional receipt if he is able to establish that the formation of an opinion of uninsurability was not made in good faith and that a reasonably prudent underwriter acting in good faith would have formed a contrary opinion; or, that the insurance company arbitrarily refused to proceed to the formation of an opinion and a reasonably prudent underwriter acting in good faith would have formed the opinion that the deceased applicant was insurable. Thus, the burden is on the plaintiff-beneficiary under either of the alternative theories to establish that a reasonably prudent authorized officer of the insurance company, acting in good faith, would, on the evidence available, find that the applicant was insurable and acceptable on the day of the completion of his medical examination. There is no testimony in this record to the effect that a reasonably prudent underwriter acting in good faith would form the opinion that Blagg was insurable and acceptable on the date of the completion of his medical examination. In fact, all of the testimony is to the contrary.

Mrs. Blagg contends that a reasonably prudent and careful underwriter, in good faith, would have formed the opinion that Blagg was, under the circumstances, insurable. But this Court does not judicially know that. It is a matter for the introduction of competent testimony. No witness gave testimony to facts which would have supported such a conclusion.

Mrs. Blagg was provided with ample opportunity on the trial of the case to produce evidence on this point which was crucial to her right to recovery on

the alternative theories. There is no contention made that the case was tried on the wrong theory, or that the evidence has not been fully developed. Counsel for Mrs. Blagg conceded on oral argument that in all likelihood no new evidence would be available in the event of a retrial. A remand under these circumstances would merely afford an opportunity for another "bite at the apple." Jackson v. Ewton, 411 S. W. 2d 715 (Tex. Sup. 1967). We do not view this as a proper case in which to exercise our discretion to remand a cause in the interest of justice.

The judgments of the courts below are reversed and judgment is here rendered that the plaintiff take nothing.

JOE GREENHILL,
Associate Justice.

Opinion delivered March 12, 1969.

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FILED
SEP 27 1969
JOHN F. DAVIS, CLE

IN THE

Supreme Court of the United States

October Term, 1969

No. 531

OCCIDENTAL LIFE INSURANCE COMPANY OF CALIFORNIA,

Petitioner,

versus

BOB LEROY'S, INC.

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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IN THE
SUPREME COURT OF THE UNITED STATES
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No. 531

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Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Bob LeRoy's, Inc., respectfully shows the Court that the relief sought by Petitioner should be denied.

OPINION BELOW

The opinion of the Court of Appeals for the Fifth Circuit (Petitioner's Appendix A) is not yet reported. The opinion was handed down on June 23, 1969. Petitioner's Motion for Rehearing was denied on July 17, 1969.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

In answer to Special Interrogatory 1A of the District Court's charge (Tr. 339, 340) the jury found that Robert H. LeRoy was an insurable risk under the Defendant Company's rules. In connection with Question 1A the Court charged the jury (Tr. 324) that "the term 'insurable risk' means the kind of risk a reasonably prudent officer in the underwriting office of an insurance company, acting in good faith on the evidence available to him, would find to be acceptable for the type of insurance applied for . . ."

The Court of Appeals for the Fifth Circuit upheld the finding of the jury on Question 1A with the following language (set forth on p. 23 of the Petition):

> "Occidental contends that the Appellee had, but failed to sustain, the burden of proof with respect to the rules and standards of Occidental as to insurability. The record discloses that the evidence relating to this phase of the case was fully developed and that the jury was properly and adequately instructed with respect thereto."

The only question involved is whether or not there was "competent testimony" to facts which would support the jury's answer to Special Interrogatory 1A.

THE DECISIONS INVOLVED

Prior to the handing down of the decision below the Texas Supreme Court announced its decision in *National Life and Accident Company v. Blagg*, 438 S.W.2d 905, opinion dated March 12, 1969. As in the present case, the *Blagg* decision involved a suit upon a "conditional receipt" of life insurance in which the burden was upon the Plaintiff to secure favorable findings on certain fact issues under principles laid down by the Texas Supreme Court in *United Founders Life Insurance Company v. Carey*, 363 S.W.2d 236 (1962).

In *Blagg* the Texas Supreme Court held that the question as to whether or not a reasonably prudent and careful underwriter, in good faith, would have formed the opinion that Blagg was, under the circumstances, insurable was a matter for the introduction of "competent testimony." Under the evidence in the case the Court found that "no witness gave testimony to facts which would have supported such a conclusion." Petition, pp. 5, 6, 14 and 37.

Petitioner might well have cited hundreds of other Texas cases holding that findings on ultimate fact issues must be supported by "competent testimony" to facts which would support the conclusion reached by the trier of facts.

STATEMENT

Petitioner has restated its brief in the Court below to support its "competent testimony" point. It thus be-

comes regrettably necessary for Respondent to restate the applicable portions of its brief in the United States Court of Appeals for the Fifth Circuit.

Following solicitation by Petitioner (Tr. 49), Robert H. LeRoy and William M. Haughton, officers of Respondent corporation, made separate applications for $25,000 insurance policies (with $25,000 accidental riders) on their lives, such policies to be owned by and payable to Respondent, the proceeds of which were to be used to fund a stock purchase agreement (Tr. 48-57; P-49, 50, 52). LeRoy's application consisted of Part I, back and front (P-49), and Part II (P-50), with the back of Part II being designated "Part III — Medical Examiner's Report to be Filled out in Private."

On July 3, 1963, LeRoy was directed by Petitioner's agents to Dr. Robert H. Thayer, one of Petitioner's designated physicians (Tr. 289), for a medical examination and completion of Part II, consisting of questions relating to LeRoy's medical history, which was signed both by LeRoy and Dr. Thayer, and at such time Part III (reverse side of P-50), consisting of Dr. Thayer's medical findings, were completed and signed only by Dr. Thayer. Among other things, Dr. Thayer found LeRoy's health to be good (Question 10C) and his blood pressure, pulse rate, and heart size, rhythm and sounds, to be normal (Questions 7, 8 and 9D).

Two days later, on July 5, 1963, LeRoy completed and signed Part I of his application, and Respondent's check for $51.26 (P-54) was delivered in payment of the first premium upon LeRoy's and Haughton's identi-

cal applications. At such time a "conditional receipt" was detached from LeRoy's application and delivered to him. The terms of the contract between the parties are contained in Part I of LeRoy's application and such conditional receipt. The applicable portions of such documents are reproduced in the Petition (pp. 6 and 7).

On July 9, 1963, LeRoy's application and check were received at Petitioner's home office in Los Angeles (date stamped on exhibits). The check was immediately deposited by Petitioner and paid by the drawee bank in El Paso on July 10, 1963. Also a retail credit report dated July 9, 1963 (P-62), was run on LeRoy, which report gives a very complete and favorable description of LeRoy's health, activities, business and financial condition, as obtained from a former employer, two local businessmen, a bank official, and LeRoy himself.

On July 22, 1963, LeRoy was accidentally killed. This fact was stipulated to by Petitioner (Tr. 14). At some time between eighteen days and four weeks after LeRoy's death (three different dates being in the record — Tr. 197, 242, 243, 297, 298), Petitioner determined he was uninsurable. Later, during pre-trial discovery proceedings, Petitioner was requested to "state specifically and in detail all of the grounds' upon which it had based its decision, in reply to which Petitioner listed seven grounds (Tr. 198-200), all of which were based upon information mainly relating to LeRoy's heart contained in the hospital records of Providence Memorial Hospital (P-1 thru P-21), in which LeRoy had been

hospitalized from August 21 to August 28, 1958 (P-1) and of Southwestern General Hospital (P-22 thru P-33), in which LeRoy had been hospitalized from March 22 to March 29, 1959 (P-30). Petitioner also answered in response to a specific written interrogatory that its decision was not directly based upon the specific provisions of an underwriting manual, document or rule (Tr. 200). Petitioner later amended such answer and referred to a specific paragraph of its underwriting manual, which it stated it had relied upon in addition to its normal underwriting procedures. This amendment was carried forward in the Court's Pre-trial Order (Tr. 14). There was no testimony at the trial concerning Petitioner's underwriting manual, although Mr. Logan, Petitioner's underwriter who made the decision that LeRoy was uninsurable, was present and testified (Tr. 260 et seq.).

At the trial Respondent produced the testimony of three of LeRoy's doctors (Drs. Gladstone, Logsdon and Searls) and four lay witnesses (Haughton, Milner, Wilson, and Mrs. LeRoy, now Mrs. Abbott), for the purpose of proving that there was nothing wrong with LeRoy's heart, and that, as of July 5, 1963, LeRoy was not only in "good health," he was in "superior health" (Tr. 68, 69).

Respondent's chief medical witness was Dr. Larry A. Gladstone, a heart specialist (Tr. 74, 75), who had on August 21, 1958, been referred to LeRoy's wife by their family doctor, Dr. Joe Galatzan, when she had reported to him that she thought LeRoy was "having a heart attack, because he has a severe pain in his

chest," to which Dr. Galatzan had replied "Mrs. LeRoy, I know nothing of the heart" (Tr. 144). Dr. Gladstone at such time placed LeRoy in Providence Memorial Hospital and attended him during the week of hospitalization (Tr. 79).

At the time of his admission LeRoy gave Dr. Gladstone a history (P-2) of having had in 1947 a "mild heart attack" consisting of an anterior chest pain and a fainting episode. This history was recorded by Dr. Gladstone in his own handwriting, and in as near LeRoy's own words as possible. It was inconceivable to Dr. Gladstone that any one having a coronary would not have had an EKG taken (as was reported in the history), and because LeRoy apparently got over the problem quickly, Dr. Gladstone didn't take the history of a coronary very seriously (Tr. 81, 82). Dr. John Searls, who had been the LeRoys' family doctor in Marfa, Texas, where they resided in 1947 (Tr. 156), testified for Respondent by deposition that, to his knowledge, LeRoy had never had a heart problem (Tr. 156-159).

Dr. Gladstone's working diagnosis at the time of LeRoy's admission to Providence Memorial Hospital on August 21, 1958, (P-3) included the possibility of "myocardial infarction" (commonly known as a "coronary" or heart attack — Tr. 86) in addition to "pericarditis" (an inflammation of the sac around the heart, the "pericardium" which does not involve the heart itself — Tr. 80), the pain caused therefrom being often indistinguishable from an acute coronary (Tr. 115, 116), and pneumonia. Dr. Gladstone's final diagnosis (P-3)

was pneumonitis and "pleuropericarditis" (a combination, which infrequently occurs, of pericarditis and pleurisy, an inflammation of the "pleura," the lining around the lungs — Tr. 89, 112), which Dr. Gladstone felt was caused by the same virus which he felt had caused the pneumonia (Tr. 88, 90). Dr. Gladstone based his final diagnosis of "pleuropericarditis", as opposed to a coronary, upon the evolvement of the EKGs taken during the week of hospitalization (Tr. 85, 86, 114, 115; P-2 thru P-21), the chest X-ray reports (Tr. 109; P-4 thru P-6), a transaminate test (Tr. 85; P-7), and the entire clinical picture, including personal observation (Tr. 86, 87). Dr. Gladstone made no notation in the hospital records indicating a heart condition, because he felt LeRoy had none (Tr. 83-85). At the time of LeRoy's discharge Dr. Gladstone felt he had completely recovered from the pleuropericarditis and Dr. Gladstone did not prescribe any medication for LeRoy, did not restrict his diet, activities, drinking or smoking, nor set up a further series of EKGs for LeRoy (Tr. 90-94).

Dr. Gladstone saw LeRoy in his office on August 29, 1958, the day after LeRoy left the hospital, and again on September 11, 1958, at which time a perfectly normal EKG was taken, which indicated a rapid recovery by LeRoy of the pleuropericarditis, and which confirmed Dr. Gladstone's final diagnosis at the hospital. At such time he told LeRoy to go back to work (Tr. 80, 89, 90, 116, 118; P-44, 47, 55, 56). Dr. Gladstone thereafter saw LeRoy on September 17, 1958, at which time LeRoy was complaining of "light headaches since yesterday," but his chest was clear and heart negative (P-47), again saw LeRoy on November 21, 1959, when he was

complaining of an anterior chest pain, but an EKG was negative, and Dr. Gladstone thought LeRoy had a cold and gave him some antibiotics (Tr. 99, 100; P-57, 58). Dr. Gladstone next saw LeRoy on June 20, 1961, when LeRoy came in for a medical check up, and Dr. Gladstone ran another EKG, which was normal (Tr. 100, 101, 104; P-59, 60), and which was the last EKG run on LeRoy by Dr. Gladstone. All of these EKGs taken over almost a three year span indicated to Dr. Gladstone that LeRoy had a normal heart and that it was not very likely that there was any disease process going on in LeRoy's heart (Tr. 118, 119).

Dr. Gladstone last saw LeRoy on June 27, 1962, when LeRoy was complaining of a pain at the juncture of the rib cartilege, which is a chest wall pain. At such time he injected LeRoy with cortisone and LeRoy did not return. At such time LeRoy was in good health and made no complaint about his heart (Tr. 104, 105). Finally, Dr. Gladstone testified that LeRoy "had no heart trouble at all" (Tr. 99, 118), and that if LeRoy had had any serious cardiac condition he didn't believe LeRoy could have pursued the schedule of strenuous activities described to him (Tr. 118).

During the period of LeRoy's hospitalization in August, 1958, Dr. Charles Logsdon, a cardiologist (Tr. 162), who did not know LeRoy (Tr. 162, 163), interpreted several of the EKGs, which he found at the time to be abnormal (P-12 thru P-17). Dr. Logsdon was called as a witness by Respondent. He testified that the Providence Memorial EKGs, as a whole, showed a "mild, persistent inflammation" (Tr. 167), and that the X-ray

reports tended to "confirm the diagnosis of pericarditis" (Tr. 170). He further testified that, on the basis of all the EKGs in evidence, that in his opinion LeRoy had a "normal heart" (Tr. 188).

When LeRoy was admitted to Southwestern General Hospital on March 22, 1959, he reported in his history that he had had "a slight heart attack September 58, hospitalized at Prov. Mem." (P-22). Dr. Gladstone had testified (Tr. 95) that LeRoy did not have a heart attack at Providence Memorial Hospital in August, 1958 (presumably the hospitalization LeRoy was referring to, as Dr. Gladstone had had LeRoy under his supervision in September, 1958 — Tr. 248), and that he had never told LeRoy he had had a heart attack (Tr. 93).

During LeRoy's March, 1959, hospitalization, only one EKG had been run (P-31, 32), which was interpreted by Dr. Ralph Homan as showing "mild coronary insufficiency. No acute changes" (P-24). However, both the working and final diagnoses by Dr. Joe Galatzan were "pneumonia bilateral severe" (P-23) and a physical examination dated March 22, 1959, showed LeRoy's heart to be "normal" (P-23). Dr. Gladstone had testified (and even Petitioner's witness, Dr. Ryan, admitted — Tr. 234) that a diagnosis cannot be made on the basis of one EKG, but that it takes a series of EKGs, together with other tests, all interpreted in the light of the entire clinical picture, to diagnose a heart condition (Tr. 86), and that the reader of an EKG gives only what may be helpful to the attending physician (Tr. 88). Dr. Gladstone further testified that abnormal EKGs can be caused by many things not connected

with the heart because the body itself conducts electricity, and the contacts used in taking the EKG readings are with the two arms, two legs, and across the chest (Tr. 135-137).

Respondent's lay witnesses testified as to the unusual health and vigor of LeRoy over a number of years, which was undiminished at the date of his death (Tr. 47, 48, 67-71). LeRoy had been a professional baseball player on a championship team (Tr. 71), was a better than average bowler and golfer and had won many trophies in both sports (Tr. 34). To the time of his death he bowled at night during the week and played golf several times a week, usually 27 holes at a time (Tr. 25, 26, 33, 34, 44, 45, 64, 65, 66), had played in a two day golf tournament on the weekend of July 3, 1963 (Tr. 69), and had just finished a four day golf tournament the weekend prior to his death (Tr. 70, 150). LeRoy was never absent from work except to play golf (Tr. 48), was always active and energetic, and never complained or seemed to feel bad, tired or winded, and always wanted to bowl another frame or play another nine holes (Tr. 31, 47, 66, 67, 68, 69). LeRoy never took medicines or dieted (Tr. 46, 66, 146, 148).

LeRoy did not solicit the insurance from Petitioner (Tr. 49). Part I of the application (P-49) showed that LeRoy had obtained insurance from other companies both shortly prior to and after the two periods of hospitalization in 1958 and 1959.

By its "Attending Physician's Statement" dated July 12, 1963 (P-46, D-1), Petitioner requested medical infor-

mation concerning LeRoy from Dr. Gladstone. On July 30, 1963, Dr. Gladstone replied, reporting, among other things, the pleuropericarditis in August, 1958, with a full recovery in 2-3 weeks, and that in June, 1961, he had run an EKG, which was normal. No further inquiry was made of Dr. Gladstone by Petitioner, written or otherwise, regarding the EKGs or medical examination (Tr. 105-108, 299).

Petitioner called as its only witnesses Dr. Ryan, a medical doctor employed by it in its medical department, who had not participated in the deliberation concerning LeRoy's insurability (Tr. 225), and Mr. Logan, employed as an underwriter by Petitioner, who had participated in the LeRoy decision (Tr. 265). Both testified that they were familiar with the underwriting rules and procedures of Petitioner (Tr. 215, 263) and testified at length regarding their application to LeRoy.

Dr. Ryan stated that the "pericarditis" alone (in August, 1958) would have made LeRoy a sub-standard risk for a period of several years, but for how many years he would not say (Tr. 230, 231). Dr. Ryan further testified (Tr. 223) that "pericarditis is a condition of the heart which is *less serious* and *might explain some* of those electrocardiographic abnormalities, but it would certainly not explain the *long history of chest pain several years before,* and of *abnormal EKGs* here later . . ." (emphasis supplied). In fact, the only records Petitioner had before it at the time it made its decision regarding LeRoy's insurability, other than the Providence Memorial Hospital records of August, 1958, indicated one prior incident of chest pain in 1947 (P-2)

and one subsequent abnormal EKG (P-24, 31, 32) taken in Southwestern General Hospital in March, 1959, when LeRoy had only pneumonia.

Dr. Ryan admitted (Tr. 236) that any underwriting decisions are based upon "subjective standards" and that "most decisions are arbitrary."

Mr. Logan testified (Tr. 245) that if none of the conditions listed by Petitioner as grounds for denying LeRoy's insurability (Tr. 198-200) in fact existed, that he "supposed" that LeRoy would have been insurable. He further testified (Tr. 295) that to be placed in the standard risk category by Petitioner all it expected was "that you be the *average of the population.* We don't expect you to be the cream, or even the middle. You can be blind in one eye, or deaf in one ear, or have *minor* impairments, but a *serious condition of the heart,* abnormal sugar in the urine, high blood pressure . . . those are all things the *average* person does not have . . ." (emphasis supplied). Mr. Logan also seemed more concerned with the medical history of an applicant than he was with the applicant's "good health" (Tr. 302, 303).

Special interrogatories in the form of Questions 1 and 1A (Tr. 339, 340) were submitted to the jury. In connection with Question 1, the Court charged the jury (Tr. 325, 326) "I instruct you that the company could not *arbitrarily* refuse the application, even though Mr. LeRoy was dead . . . they had to *act in good faith* and as a *reasonably prudent officer would have acted, just as if Mr. LeRoy was still living* . . . They had a right

and were required to take into consideration the company's rules and standards for determining insurability . . . *but they could not take into consideration the fact that he had been accidentally killed between the time he made his application and paid the first month's premium* . . ." (emphasis supplied).

In connection with Question 1A the Court charged the jury (Tr. 324) that "the term 'insurable risk' means the kind of risk a *reasonably prudent officer* in the underwriting department of an insurance company, *acting in good faith on the evidence available to him,* would find to be acceptable for the type of insurance applied for . . ." (emphasis supplied).

In response to Questions 1 and 1A the jury answered that Petitioner had not made its decision in good faith, and that LeRoy was insurable under Petitioner's rules and regulations for the insurance applied for.

ARGUMENT

Questions 1 and 1A were submitted to the jury by the Court under authority of *United Founders Life Insurance Company v. Carey,* 363 S.W.2d 236 (Sup. Ct. of Texas), involving a conditional receipt very similar to the one in our case, and also involving the death of the applicant prior to the determination by the insurance company as to his insurability. Petitioner claims that the jury's finding in answer to Question 1A was not based on "competent testimony," as is required by *Blagg,* supra.

To support its contention, Petitioner argues that all of Respondent's testimony was concerned with the "good health" of LeRoy on July 5, 1963, as opposed to his "insurability" under the Petitioner's rules and practices. Petitioner cites (Petition, pp. 14 and 15) a New York State Court policy reinstatement case, holding that "insurability" can include facts other than "good health," such as insolvency or probability of suicide or execution under a death sentence. Respondent does not question the validity of this proposition, as a general matter, but respectfully submits that, under the evidence in the present case, there were no elements of "insurability" involved other than LeRoy's "good health." At least the jury under the evidence could have reasonably so concluded.

As for the asserted absence of any evidence of Petitioner's rules and regulations, Respondent submits that there was ample evidence that Robert H. LeRoy was at least the *average of the population* and that he had no *serious impairment* of his health under Petitioner's rules (Tr. 295). In any event, Respondent submits that the very nature of the case made it necessary for the evidence concerning Petitioner's rules and regulations to come from Petitioner's own employees. Dr. Ryan and Mr. Logan, who testified at length about them and their application to their decision concerning LeRoy's insurability. Such witnesses were not unbiased, but on the other hand were extremely *interested* in having their decision concerning the LeRoy application upheld, all of which was undoubtedly obvious to the jury, who were able to hear such witnesses and observe their demeanor. Under the circum-

stances tending to cast suspicion upon the testimony of these witnesses, which was far from clear, direct, positive and free from contradiction by attendant circumstances, there was ample evidence for the jury in its answer to Question No. 1A to reasonably conclude that Petitioner's rules and regulations were not such, if fairly applied by Petitioner's officers and agents to the facts available concerning LeRoy's health, as to make Robert H. LeRoy uninsurable under them. *Moss v. Hipp*, 387 S.W.2d 656 (Sup. Ct. of Texas).

Respondent would respectfully show the Court that the jury's answer to Special Interrogatory 1A was supported by "competent testimony," and there is no conflict between the decision of the Fifth Circuit below and the decision of the Texas Supreme Court in *Blagg*, supra.

CONCLUSION

Respondent prays that the relief sought by Petitioner be in all things denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing brief has been served upon opposing counsel of record by placing the same properly addressed in the United States Mail with adequate postage affixed thereto.

Jack L. Brewster